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WILKINSON, BARKER, KNAUER & QUINN

LAW OFFICES
1735 NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20006-5289
(202) 783-4141

TELECOPIER
(202) 783-5851
(202) 833-2360

GERMAN OFFICE
GOETHESTRASSE 23
60313 FRANKFURT, GERMANY
011-49-69-20876
011-49-69-297-8453 (TELECOPIER)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 19, 1994

PR 94-103

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Attached are the comments of BellSouth Corporation ("BellSouth") in PR File No. 94-SP1. In these comments there is a facsimile copy of a declaration signed by Robert Osias, General Manager with Hawaiian Cellular Telephone Company. The purpose of this letter is to inform you that we will file the original signed declaration as soon as we receive it from Hawaii.

Sincerely,

WILKINSON, BARKER, KNAUER & QUINN

By: Michael A. Mandigo

Enclosures

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Petition of Public Utilities	)	
Commission, State of Hawaii, for	)	
Authority to Extend Its Rate	)	PR File No. 94-SP1
Regulation of Commercial Mobile	)	
Radio Services in the State of	)	
Hawaii	)	

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION IN OPPOSITION TO HAWAII PUBLIC UTILITIES COMMISSION'S PETITION TO CONTINUE RATE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES

L. Andrew Tollin
Michael Deuel Sullivan
Michael A. Mandigo
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, DC 20006
(202) 783-4141

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-4445

Charles P. Featherstun
David G. Richards
1133 21st Street, N.W., Suite 900
Washington, DC 20036
(202) 463-4132

Attorneys for BellSouth Corporation

September 19, 1994

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Federal Communications Commission
WASHINGTON, DC 20554

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION IN OPPOSITION TO HAWAII PUBLIC UTILITIES COMMISSION'S PETITION TO CONTINUE RATE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES

BellSouth Corporation, on behalf of BellSouth Cellular Corp.("BSCC") and Mobile Communications Corporation of America ("MCCA")(hereinafter "BellSouth"), files these comments in opposition to the petition filed by the Hawaii Public Utilities Commission ("HPUC"), pursuant to Section 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(3) (the "Act"), for authority to continue to regulate rates of commercial mobile radio service ("CMRS") providers in the State of Hawaii.[1/]

1/ BellSouth owns subsidiaries which hold and operate the B Block cellular license in Honolulu, as well as paging systems in Hawaii. BellSouth is subject to HPUC jurisdiction and is familiar with the HPUC's regulation and actions.

SUMMARY

The HPUC seeks authority both to continue its current regulation of CMRS providers, under which providers file tariffs, and to consider initiating rate-based regulation. It has not met the statutory standard either for continuing its existing regulation or for initiating new forms of regulation. Accordingly, its petition should be denied.

Under Section 332 of the Act, Congress preempted state rate and entry regulation of CMRS providers in order to establish a federal regulatory framework to govern CMRS. Section 332 nevertheless allows states to petition to continue their existing rate regulation or to initiate new rate regulation. There is a substantial burden on a state filing such a petition. The state must show that (1) "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory" or (2) "such market conditions exist, and such service is a replacement for . . . a substantial portion of landline telephone exchange service" in the state. A state may petition to continue its existing rate regulation in effect only to the extent the state actually regulated rates as of June 1, 1993; a state filing such a petition by August 10, 1994 may continue its rate regulation until an FCC denial of its petition has become final.

The HPUC has clearly failed to meet its burden of proof under Section 332. Its petition does not even allege that market

conditions currently fail to protect subscribers. It does not demonstrate that its current system of tariffs will protect consumers better than the regulatory framework established by the FCC. To the extent it seeks to continue its tariff review process, its petition should therefore be denied.

The HPUC also seeks authority to consider changes to its current scheme of regulation. It has begun an investigation into whether it should initiate rate base regulation of CMRS providers. This cannot be viewed as a petition to continue its current regulation of CMRS. The Commission should not countenance the HPUC's apparent attempt to use the statutory provision allowing the continuance of existing state regulation pending final resolution of its petition as a means to impose new regulation on CMRS providers without prior Commission approval.

To the extent the HPUC seeks authority to institute new forms of rate regulation, it does not meet the statutory burden. The petition alleges only that market conditions "may" fail to protect consumers adequately. It provides no evidence that there is actual market failure requiring new forms of rate regulation to protect consumers from unjust, unreasonable, or discriminatory rates. Accordingly, the Commission should deny the HPUC's request for authority to initiate new forms of rate regulation.

DISCUSSION

I. THE 1993 BUDGET ACT ESTABLISHED A COMPREHENSIVE AND UNIFORM REGULATORY FRAMEWORK TO GOVERN THE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES AND IMPOSED A SUBSTANTIAL BURDEN ON STATES SEEKING TO REGULATE RATES.

A. Congress Preempted State Rate Regulation In Favor of a Comprehensive Federal Policy of Minimal Regulation

On August 10, 1993, the U.S. Congress enacted the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),[2/] which created a new "*Federal regulatory framework* to govern the offering of *all commercial mobile services.*" H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 490 (1993) ("Conference Report") (emphasis added).[3/] Under new Section 332(c)(1)(A) of the Communications Act, 47 U.S.C. § 332(c)(1)(A), Congress "*replaced traditional regulation of mobile services* with an approach that brings all mobile service providers under a *comprehensive, consistent, regulatory framework* and gives the Commission the flexibility to establish

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[2/] Omnibus Reconciliation Act of 1993, P.L. No. 103-66, Title VI, § § 6002(b)(2)(A) and 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

[3/] The "commercial mobile services" covered by this assertion of federal primacy include cellular, paging, and many Specialized Mobile Radio ("SMR") services, as well as emerging new mobile services, such as PCS, that are interconnected with the telephone network and provide service to the public. 47 U.S.C. § 332(c)(2), (d)(1); *see Regulatory Treatment of Mobile Services*, Gen. Docket 93-252, Second Report and Order, 9 FCC Rcd 1411, 1468, 74 Rad. Reg. 2d (P&F) 835, 870 (1994) (*CMRS Second Report*).

appropriate levels of regulation for mobile radio services providers." *CMRS Second Report*, 9 FCC Rcd at 1417, 74 Rad. Reg. 2d at 841 (1994) (emphasis added).

In Section 332(c)(3), 47 U.S.C. § 332(c)(3), Congress expressly preempted all state rate and entry regulation of CMRS. As discussed below, the statute contains a narrow exception allowing states to petition for authority to regulate rates, but only under limited conditions.

At the same time, Section 332 provides that CMRS providers are deemed common carriers subject to Title II of the Communications Act. However, Congress specifically authorized the FCC to exempt CMRS providers from all but three core provisions to Title II. 47 U.S.C. §332(c)(1)(A). Congress intended by this to allow the FCC to determine the extent to which traditional common carrier regulation was "needed to ensure charges are just and reasonable or otherwise in the public interest." H.R. Rep. No. 93-111, 103rd Cong., 1st Sess. 260-61 (May 25, 1993) ("House Report").[4/]

[4/] Congress specifically intended, among other things, that the FCC have the authority to forbear from tariff regulation of CMRS. The Commission had previously done so for non-dominant interexchange carriers, but its policy was vacated by the D.C. Circuit for lack of statutory authority. *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992). Section 332 was "intended to give the Commission the authority to reinstate this policy" for CMRS licensees, to the extent warranted. House Report at 260.

B. The FCC Implemented this Federal Regulatory Framework by Exempting All CMRS Providers From Significant Title II Regulations to Foster Competition

Since the passage of the Budget Act, the FCC has taken major steps to carry out the Congressional plan for ensuring competitive development of service by minimizing regulation. In the *CMRS Second Report*, the Commission overhauled its regulation of CMRS and established the degree and nature of Title II regulation applicable to CMRS. 9 FCC Rcd at 1413; 74 Rad. Reg. 2d at 839.

Consistent with the statutory objective, the Commission's principal goal was to ensure that unwarranted regulatory burdens are not imposed upon any mobile radio licensees. *Id.* at 1418, 74 Rad. Reg. 2d at 842; *see also* House Report at 261. Using a market power analysis based on the Commission's *Competitive Carrier* decisions,[5] the Commission determined that all CMRS

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[5] *Competitive Carrier Rulemaking,* CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1, 52 Rad. Reg. 2d 215 (1980) (*First Report*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Further Notice*); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983) (*Third Report*); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*), *vacated sub nom. AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied;* Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922(1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.* 59 Rad. Reg. 2d 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

providers (other than cellular licensees) currently lack market power and that there was "sufficient" competition in the cellular services marketplace to relax some Commission policies traditionally applied to non-competitive markets. *CMRS Second Report*, 9 FCC Rcd at 1470, 1478, 74 Rad. Reg. 2d at 871, 875. *See also Cellular CPE Bundling Order*, 7 FCC Rcd 4028, 4028-29 (1992).

Based on this record, the FCC decided that all CMRS providers, including cellular providers, should be exempt from tariff filings, contract filings, and market entry/exit requirements found in Sections 203, 204, 205, 211, and 214 of the Communications Act. *CMRS Second Report*, 9 FCC Rcd at 1475-81, 74 Rad. Reg. 2d at 874-877. These actions were taken explicitly to promote competition, innovation, market entry and flexibility.[6/]

The Commission said it preferred to rely on competition, rather than regulation, because "[c]ompetition, along with the

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[6/] *Id.* The Commission has repeatedly held that the substitution of regulatory considerations for marketplace forces, without a demonstrated public benefit, denies the public the benefits of competitive services in response to public need and business judgment. *Preemption of State Entry Regulation in the Public Land Mobile Service*, 59 Rad. Reg. 2d 1518 (1986) *remanded on other grounds sub nom. NARUC v. FCC*, No. 86-1205, 19987 U.S. App. Lexis 1781 (D.C. Cir. Mar. 30, 1987), clarified, *Preemption of State Entry Regulation in the Public Land Mobile Service*, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987) (*citing Competitive Carrier, First Report,* 85 FCC 2d 1 (1980), *Fifth Report,* 98 FCC 2d 1191 (1984)). *See also Tariff Filing Requirements for Non-Dominant Carriers*, 8 FCC Rcd 8752 (1993), erratum, mimeo 34716, 58 Fed. 48323 (Sept. 15. 1993) (removing or reducing regulatory requirements tends to encourage market entry and lower costs).

impending advent of additional competitors, leads to reasonable rates." *CMRS Second Report*, 9 FCC Rcd at 1478, 74 Rad. Reg. 2d at 875. In particular, it decided that tariff regulation of CMRS providers was inappropriate in a competitive environment because:

> tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring. ... [W]ith the near-term growth of competition, it is reasonable to conclude, as required by Section 332(c)(1)(C), that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition.

CMRS Second Report, 9 FCC Rcd at 1479, 74 Rad. Reg. 2d at 876 (citations in text omitted).[7]

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[7] In addition to exempting carriers from the provisions of Title II mentioned above, the Commission also noted that establishing a stable, predictable Federal regulatory environment sends an important signal to the investment community that regulation would not be a burden standing in the way of entrepreneurial opportunities and would instead facilitate prudent business planning. *CMRS Second Report,* 9 FCC Rcd at 1420-22, 74 Rad. Reg. 2d at 843-44.

C. State Regulation of CMRS Rates is Permitted Only in Limited Cases, When States Make a Substantial Showing that Current Market Conditions Require Rate Regulation for the Protection of Consumers

While the principal intent of the new statute was to create a uniform Federal regulatory scheme, Congress created a narrow exception to Federal preemption of state rate regulation. A state is permitted to continue rate regulation or to initiate rate regulation if it can demonstrate to the FCC that:

> (1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (2) such market conditions exist, and such service is a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service within such State.[8/]

The petitioning state has the "substantial" burden of proving that it meets the requirements for either of these exceptions:

> [I]n implementing the preemption provisions of the new statute, we have provided that *states must, consistent with the statute, clear substantial hurdles* if they seek to continue or initiate rate regulation of CMRS providers.

[8/] 47 U.S.C. § 332(c)(3)(A)(i), (ii). Section 332(c)(3)(A) sets forth the standard that states must meet to initiate rate regulation. The standard for continuing the rate regulation engaged in as of June 1, 1993 is the same, except that a state's filing of a petition to do so by August 10, 1994 will automatically continue that regulation in force until the Commission decision to deny it is final, including any reconsideration. 47 U.S.C. § 332(c)(3)(B).

CMRS Second Report, 9 FCC Rcd at 1421, 74 Rad. Reg. 2d at 843 (emphasis added).

To guide states in satisfying this burden, the Commission included in its Rules a detailed list of the types of evidence, information and analysis that it would consider in evaluating a state petition, 47 C.F.R. § 20.13. The Rule makes clear that states cannot overcome the statutory goal of uniform, efficient, minimal federal regulation easily. A state must satisfy its burden of proof with a detailed factual showing regarding the unique local market conditions that make state rate regulation essential for the protection of consumers.[9/]

II. THE HPUC'S PETITION TO CONTINUE TARIFF REGULATION SHOULD BE DENIED BECAUSE THE HPUC HAS NOT MET THE STATUTORY BURDEN OF SHOWING THAT CURRENT MARKET CONDITIONS REQUIRE RATE REGULATION FOR THE PROTECTION OF CONSUMERS

Measured against the statutory standard for continuing existing rate regulation, the HPUC's petition plainly should be denied. The HPUC seeks to continue its current system of regulating CMRS rates through a tariff review process.[10/] The HPUC

[9/] 47 C.F.R. § 20.13(a),(b).

[10/] The HPUC seeks to continue to regulate rates until the conclusion of its communications infrastructure docket, which was initiated in May 1993 to examine issues that surround communications technologies and services. The HPUC intends to test market driven rates of CMRS against the cost of service and the rate of return. The HPUC anticipates that a final decision in that docket will be made in mid-1995. HPUC Petition at 3-6. In this Section, BellSouth addresses only the continuation of the existing form of HPUC rate regulation. The following Section addresses the HPUC's (continued...)

does not even attempt to meet the statutory requirement of showing that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," 47 U.S.C. § 332(c)(3)(A)(i).

The HPUC states only that it "is *uncertain* whether the initial market driven rates that Petitioner approved for the CMRS utilities when they were certificated are currently just and reasonable." HPUC Petition at 3 (emphasis added). The HPUC offers little basis for its uncertainty.[11/] It provides *no evidence* concerning market conditions, *no evidence* concerning any consumer complaints, *no evidence* of discrimination, and *no evidence* that consumers are charged rates that are unjust or unreasonable. It offers no analysis of the little evidence it does supply,[12/] and it offers no supporting information or method

(...continued)
apparent request for authorization to impose new regulation at the conclusion of its inquiry.

11/ As stated above, the statute, its legislative history, and the implementing decisions of the FCC speak with a united voice that *current* market conditions must be shown to inadequately protect consumers. A showing of current market conditions requires a petitioner to make its demonstration based on actual and certain terms. The HPUC petition fails to do so.

12/ The HPUC submitted only the following evidence: Lists of CMRS providers currently under regulation, including the period of time each provider has offered services and selected annual revenue and rate of return figures (Attachments 1 and 2); financial statement summaries for CMRS
(continued...)

ology indicating how certain information was derived. The HPUC admits that no CMRS provider has ever come before it for a rate increase. HPUC Petition at 6.

The HPUC offers only one basis for its claim that CMRS providers' rates may not be just and reasonable. That is its belief that the rates of some carriers currently may result in earnings higher than would be allowed under rate base regulation, which would permit only recovery of costs plus a return on capital investment. *Id.* at 4,5.

BellSouth submits that this falls short of the showing required by the statute. The HPUC did not indicate how it calculated the rates of return included in its attachments. For at least some carriers, these figures are miscalculated and fail to account for factors that would generally be recognized as reducing the rate of return.

For example, the HPUC purports to calculate the rate of return on Honolulu Cellular Telephone Company's ("HCTC") net estimated plant and equipment. HPUC Petition at Attachment 1, p. 3. However, the HPUC has failed to take into account multi-million dollar expenditures incurred by BellSouth to acquire an

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(...continued)
providers (Exhibits A1 through A8); tariffs showing the rates for each CMRS provider (Attachment 3); and the regulations it proposes to impose on CMRS providers (Attachment 4).

ownership interest in HCTC.[13] As a result, the HPUC has dramatically overstated HCTC's financial return. Furthermore, the HPUC ignores risk in its rate of return calculations, which causes an overstatement.[14]

Moreover, instead of calculating the real costs associated with payment of federal and state taxes, the HPUC used "pre-tax" financial information. HPUC Petition at Attachment 1, p. 3. This calculation error also has caused an overstatement of HCTC's financial return. BellSouth also notes that the HPUC has attempted to estimate the financial performance of HCTC as if it were only selling cellular service. BellSouth assumes that the rationale for this approach is that customer premises equipment ("CPE") is not regulated. However, there can be no doubt that equipment sales, for example, are a large and integral part of the HCTC's cellular business.

With regard to the sale of CPE, BellSouth has two problems with the HPUC's return calculations. First, the HPUC has over-allocated expenses to the sale of CPE, which results in an overstatement of return for the cellular service business of

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13/ BellSouth investment in HCTC is not public. Instead, BellSouth acquired its ownership interest through a series of transactions involving MCCA and RAM Broadcasting.

14/ For a more detailed discussion on this, and other HPUC errors, *see* Affidavit of Richard P. Rozek at 4-7 attached to BellSouth's comments.

HCTC.[15/] Second, by excluding altogether equipment sales from its return calculations, the HPUC has failed to provide a complete picture of HCTC's cellular business. Generally, HCTC loses money on its equipment sales. Consequently, the HPUC's failure to include revenue and expense figures for CPE sales into HCTC's calculated financial return causes additional overstatement.

Finally, BellSouth submits that it is inappropriate to look at a single year as a measure of profitability. BellSouth believes that it would have been more appropriate, given the start-up years of cellular service, for the HPUC to look at a blended rate of return for the entire period of operation. This approach would have, of course, dramatically reduced the return attributable to HCTC's operations. As of December 31, 1992, HCTC's accumulated earnings were a negative $3.7 million.[16/] HCTC showed accumulated earnings of approximately $4.1 million in 1993.[17/] Therefore, only in 1993 has HCTC's net income exceeded the size of the deficit in accumulated earnings.

15/ For example, in 1993, the sale of CPE generated $5.8 million for HCTC, or about 15 percent of HCTC's revenues. Yet, the HPUC has apparently allocated $9.7 million, or about 32% of HCTC's revenues.

16/ If an interest factor (or carrying cost) were attributed to the losses incurred by HCTC through 1992, the negative net accumulative earnings would be even larger.

17/ These figures were derived from HCTC's statements of operations and accumulated earnings for the years 1992 and 1993, copies of which were filed with the HPUC.

More importantly, when a non-rate-base-regulated company earns a rate of return that exceeds what would be allowed under rate-base regulation, it does it not mean that the company's rates are unjust, unreasonable, or discriminatory. In fact, rate-base regulation has been criticized because it penalizes companies that increase efficiency and lower unit costs by reducing their revenue requirement. As a result, rate-base regulation creates a disincentive to lower costs, because that will reduce rates and net profits. That is why the FCC and numerous states have departed from rate-base regulation for many telecommunications services and have opted for some form of incentive-based regulation, as in establishing price caps or some other form of "alternative regulation" which ensures greater long-term pricing stability for consumers, provides carriers pricing flexibility and increases their economic incentives for improved management efficiency.[18/]

18/ *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987)(*Notice*); Further Notice of Proposed Rulemaking, FCC Rcd 3195 (1988)(*Further Notice*); Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989)(*AT&T Price Cap Order*); *modified on recon.*, 6 FCC Rcd 665 (1990)(*AT&T Price Cap Reconsideration Order*). *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 FCC Rcd 6786 (199)(*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990) *modified on recon.*, 6 FCC Rcd 2637 (1991)(*LEC Price Cap Reconsideration Order*), *aff'd, National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

The HPUC has always allowed CMRS licensees to set their rates at market levels. One year has elapsed since the passage of the Budget Act, in which the HPUC had the opportunity to investigate cellular rates and to assemble evidence that continued regulatory supervision of market based rates was essential to protect subscribers adequately from unjust, unreasonable or discriminatory rates. The HPUC's inability to provide any evidence that continued tariff filings and regulatory supervision over market-based rates are required to protect subscribers, despite having had a reasonable time to gather such evidence, demonstrates that there is no basis for granting the HPUC petition. Having failed to carry its burden, the HPUC's petition to continue its tariff regulation should be denied.

III. THE HPUC'S REQUEST FOR AUTHORITY TO INITIATE NEW FORMS OF REGULATION FAILS TO SATISFY THE STATUTORY CRITERIA

In addition to seeking to continue its existing rate regulation, the HPUC appears to seek authority to initiate new forms of regulation of CMRS providers, including possible rate-base regulation. HPUC Petition at 4-5.

While the standard that a state must meet is the same in the case of continuing and initiating regulation, there is an important distinction. Forms of regulation other than those in effect as of June 1, 1993 are not "grandfathered" by the filing of the

HPUC petition. *See* 47 U.S.C. § 332(c)(3)(B).[19] The current tariff regulation remains in effect pending FCC consideration of the HPUC petition. Any regulation that the HPUC may subsequently seek to apply to CMRS providers, however, is preempted. To impose any new or different regulation, the HPUC must obtain the FCC's prior authorization, upon proper petition. The Commission should not countenance an apparent attempt by the HPUC to "grandfather" regulations not in existence as of June 1, 1993.

To the extent the HPUC seeks to impose new or different forms of regulation on CMRS providers than the current rate regulation, the petition fails to meet the statutory burden and should be denied. The same lack of evidence discussed above exists here: there is simply no showing that market conditions currently are such as to require state rate regulation of any kind.

In particular, the HPUC has not shown that its specific proposed regulations are needed to prevent unjust, unreasonable, or discriminatory rates. The FCC rules contemplate that a state would allege specific allegations of fact regarding anticompetitive or discriminatory practices, as well as present evidence demonstrating with particularity instances of systematic unjust

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[19] "State authority to regulate is 'grandfathered' only to the extent that it regulates commercial mobile services 'offered in such State on such date.'"

or unreasonable rates.[20] The rules state that "evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative." 47 C.F.R. § 20.13(a)(2)(vii). The HPUC presents no such information or evidence as part of its demonstration. Indeed, it admits that it is uncertain whether current rates are unjust or unreasonable. HPUC Petition at 4.

Moreover, the Rules require that a petitioner "identify and describe *in detail* the rules the state proposes to establish if the petition is granted." 47 C.F.R. § 20.12(a)(4) (emphasis added). The HPUC characterizes its Attachment 4 as fulfilling this part of its demonstration. However, an examination of the document reveals that only a few of the proposed regulations pertain to rates.[21] The HPUC proposes to require the filing of tariffs, regulate deposits and extensions of credit, and to require prior authorization for major capital improvements that is wholly inappropriate for an industry characterized by rapid

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[20] It is true that the list of pertinent information contained in Section 20.13 is not intended to be exhaustive. Nevertheless, it is significant that the HPUC has not filed any of the material described therein *or any other factual material concerning unjust, unreasonable, or discriminatory rates.*

[21] Much of the HPUC proposal is devoted to record keeping requirements, customer relations obligations, engineering, inspections and tests of equipment, quality of service and safety measures.

technological change and growth.[22/] The issue for the Commission is whether the HPUC has tied such regulation to a particular, *demonstrated* failure of the market to protect subscribers. The answer is that it has not made such a tie-in, and its petition cannot be granted.[23/]

[22/] The HPUC proposal regarding major capital improvements is as follows:

> Proposed capital expenditures ... in excess of $500,000 or 10 percent of total plant in service, whichever is greater, are to be submitted to the Commission for review at least 60 days prior to the commencement of construction or commitment for expenditure, whichever is earlier. If the Commission determines, after a hearing on the matter, that any portion of the proposed project provides facilities which are unnecessary or are unreasonably in excess of probable future requirements for utility purposes, then the CMRS utility shall not include such portion of the project in its rate base. HPUC Petition, Attachment 4 at 4.

BellSouth contends that such draconian regulation will significantly set back competition in the CMRS marketplace. Carriers planning to introduce new technologies, cover new areas, or increase capacity, either on their own initiative or in response to competition, will have to make their plans public well in advance and give their competitors an opportunity to block such improvements. Indeed, such regulation goes well beyond the scope of FCC regulation of local exchange carriers. In the absence of a monopoly providing an essential service to captive ratepayers, such regulations are clearly contrary to the public interest.

[23/] BellSouth notes that denial of the HPUC petition would not preclude a later filing if the HPUC can make out a factual case for the proposition that its proposed regulations are necessary to overcome market failure. Section 332(c)(3)(A) permits the HPUC to petition for authority to initiate rate regulation at any time in the future if and when it can demonstrate market failure.

Indeed, the HPUC petition seeks authority to regulate all CMRS services, including paging services. Its petition contains *no evidence* regarding rate problems or discriminatory conduct on behalf of paging service providers. The HPUC has therefore made no showing rebutting the FCC's long-standing and repeated findings that paging is a highly competitive market that is characterized by large numbers of service providers, ease of market entry, and ease of changing service providers. *See CMRS Second Report*, 9 FCC Rcd at 1468, *citing* EMCI, "The State of the US Paging Industry" (1990), EMCI, "The State of the US Paging Industry" (1993).

Finally, the HPUC petition is so deficient in showing current market failure that if a state could overcome federal preemption with a showing such as this, a dangerous precedent would be established whereby virtually *any* state could petition the FCC and be granted authority to continue or initiate rate regulation, frustrating Congressional intent. Therefore, BellSouth asserts that the HPUC petition should be denied because of its conditional, uncertain, and inconclusive showing.[24]

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[24] It is important to add that the HPUC has had a year since the passage of the Budget Act to investigate cellular rates and to prepare a demonstration that market conditions fail to protect subscribers adequately from unjust, unreasonable or discriminatory rates. A year is reasonable time for the HPUC to gather information and make a showing that meets its statutory burden. Yet, while the HPUC has not completed its investigation of the rates and practices of cellular carriers in Hawaii, it wants the FCC to allow it to continue to (continued...)

IV. PERTINENT INFORMATION GATHERED BY BELLSOUTH SHOWS NO MARKET FAILURE IN HAWAII

The HPUC admits that CMRS rates in the State of Hawaii have always been market driven rates. HPUC Petition at 4. Moreover, the HPUC admits there has never been a rate increase for cellular service in Hawaii. *Id.* at 6. Indeed, according to BellSouth's information, cellular rates in Hawaii are some of the lowest in the country.

Moreover, the rates for cellular services in Hawaii have been steadily decreasing over the years. Since the inception of cellular services in Hawaii, carriers have introduced numerous new rate plans to meet varying customer needs. Carriers have also introduced many promotions that have had a significant impact on competition by increasing customer base and use of cellular services. Most promotions involve some sort of discount on the rates for services or an offer to waive service charges

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(...continued)
regulate rates until the HPUC investigation is completed.

BellSouth submits that waiting for the completion of the HPUC investigation is an insufficient ground to overcome preemption under Section 332(c)(3)(B). Waiting until mid-1995 for the HPUC decision is an unacceptable delay in light of the notice the HPUC received regarding preemption and the substantial showing required to overcome preemption. The HPUC has not asserted that it has done all it could but that it needs more time to gather information and make its case. Rather, it wants the FCC to wait so that the HPUC can act on its own schedule. Again, this is not the standard established by Congress under Section 332 and, therefore, the FCC should not grant the HPUC petition based on this sort of showing.

under certain conditions. Carriers not only have taken the lead on introducing promotions and new rate plans, they have also been very aggressive to respond to discount offers and promotions offered by competitors. A chronological history showing the trend of cellular service rate reductions by HCTC is attached as Exhibit A.

In short, rather than demonstrating that there is current market failure in Hawaii, BellSouth submits that the HPUC's generally hands-off regulation serves as a model demonstrating that market driven policies, not draconian rate of return regulation, better serve the public interest. Congress has now passed the torch to the FCC to continue on the road that Hawaii set out on. Therefore, BellSouth maintains that the HPUC petition should be denied to give the FCC's CMRS policies freedom to work without undue state interference.

Attached to BellSouth's comments is an affidavit of Dr. Richard P. Rozek, an economist with National Economic Research Associates, Inc. ("NERA") on state regulation of commercial mobile radio services. Dr. Rozek explains that state rate regulation of cellular services has actually raised costs to consumers and has impeded competition. Rozek affidavit at 3.[25/]

[25/] For example, HPUC tariff regulation provides for a 30-day notice period before tariffs are permitted to take effect. Although the HPUC's rules allow short-notice filings on less than 30 days on good cause shown, the HPUC has emphasized to carriers that judicious use of short-notice filings should (continued...)